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AHMAD NADZRIN ABD HALIM & ANOR v. ALLIANZ GENERAL INSURANCE COMPANY (M) BHD

COURT OF APPEAL, PUTRAJAYA
LIM YEE LAN JCA
HAMID SULTAN ABU BACKER JCA
B PRASAD SANDOSHAM ABRAHAM JCA
[CIVIL APPEAL NO: W-02(NCVC)(A)-1390-08-14]
27 AUGUST 2015

C ***INSURANCE:*** *Motor insurance – Liability – Personal injury damages suit brought by third party – Insurer sought for declaration that insurance policy issued was void and unenforceable – Application filed upon discovery of change in ownership of insured vehicle without due notice given to insurer – Whether application should have been filed before date of accident – 'if before the date the liability was incurred' under s. 96(3) of Road Transport Act 1987 – Interpretation of – Whether an insurer* D *can commence action to repudiate policy issued in respect of insured vehicle before any judgment is obtained in proceedings commenced by third party*

The appellants/interveners ('the appellants') had filed a personal injury damages claim in the Sessions Court against the driver ('Danial') and the owner of a car ('the defendant') insured by the insurer ('the respondent') E which collided with a motorcycle the appellants were riding. The respondent, however, discovered that the defendant had sold the motorcar to Danial's father prior to the accident and that the ownership change was not registered with the Road Transport Department. Thus, the respondent made an application to the High Court for a declaration under s. 96(1) of the Road F Transport Act 1987 ('the Act') that the insurance policy issued by them was void and/or unenforceable on grounds that there had been a change in the ownership of the insured vehicle without due notice being given to the respondent. The appellants argued that the respondent's application to cancel the policy under s. 96(3) of the Act was out of time. It was further submitted G by the appellants that the phrase 'the date the liability was incurred' in s. 96(3) of the Act must be interpreted as requiring an application under that subsection to be made before the date of the accident. According to the appellants, since the application was made after the accident, it could not be maintained and must be dismissed. The Judicial Commissioner ('JC') H dismissed the appellants' objection and granted the declaration sought by the respondent. Dissatisfied with the said decision, the appellants appealed. The issue raised was when could an insurance company commence an action under s. 96(3) of the Act to declare a policy issued to an insured in respect of an insured vehicle void or unenforceable.

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Held (dismissing appeal with no order as to costs)
Per Hamid Sultan Abu Backer JCA:

(1) Under s. 96(1) of the Act, if judgment has been made against the motor vehicle owner, the law requires the insurer to pay to the third party who holds the judgment, notwithstanding the insurer could have avoided or cancelled the policy. The exceptions are spelt out in sub-ss. 96(2) and (3) of the Act. (para 50)

(2) A declaration can be obtained before the judgment in the negligence suit. The court can, however, refuse the declaration if the interveners can demonstrate prejudice in consequence of the delay by the respondent approaching the court for the relief, taking into consideration that the relevant provision has the characteristic of social legislation. (para 52)

(3) The affidavit of the appellants did not demonstrate any fact relevant to the question of prejudice or that it would be unjust to grant a declaration at this stage, save that the deponent only complained of delay and not prejudice to sustain third party claim in consequence of delay which could not be compensated by costs by the insurer in respect of the delay. (para 52)

Per Prasad Sandosham Abraham JCA:

(1) The respondent was entitled to obtain a declaration from the court that its policy was void and/or unenforceable before judgment was entered against the respondent which was when liability will be incurred by the respondent. The words 'judgment in respect of any such liability as is required to be covered by a policy under para. 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy' under s. 96(1) of the Act supported that proposition. (para 69)

(2) The liability of the defendant (the insured) only arises when judgment is obtained against the defendant. Obtaining of the judgment is a condition precedent to liability and therefore the words should be interpreted to read that the respondent was entitled to make the application to declare the insurance policy void and unenforceable before judgment was entered against the defendant. The respondent had complied with s. 96(3) of the Act. (paras 72 & 73)

Per Lim Yee Lan JCA:

(1) Section 96(3) is intended to cover a situation in which the accident which was the cause of the death or bodily injury giving rise to the liability covered by the terms of policy had already occurred but before any judgment is pronounced by the court in the proceeding commenced by the third party to claim damages against the driver and insured owner in respect of such bodily injuries and/or death. (para 25)

(2) The first line of decisions went into error when, without looking at s. 96 as a whole, they had interpreted the words 'before the date the liability was incurred' in s. 96(3) to mean a date before the accident, without realising that the circumstance under which a policy can be cancelled before the accident is already covered under s. 96(2)(c) of the Act. (para 26)

(3) Under s. 96(3) of the Act, an insurer can commence an action to repudiate a policy issued in respect of an insured vehicle before any judgment is obtained in the proceeding commenced by a third party for damages for bodily injuries or death sustained in a road accident caused by or arising from the use of the insured vehicle. (para 39)

Bahasa Malaysia *Translation of Headnote*

Perayu-perayu/pencelah-pencelah ('perayu-perayu') memfailkan tuntutan ganti rugi kecederaan peribadi di Mahkamah Sesyen terhadap pemandu ('Danial') dan pemilik kereta ('defendan') yang diinsuranskan oleh syarikat insurans ('responden') yang telah bertembung dengan motosikal yang dinaiki perayu-perayu. Responden, walau bagaimanapun, mendapati bahawa defendan telah menjual kereta tersebut kepada bapa Danial sebelum berlakunya kemalangan dan pertukaran pemilikan tidak didaftarkan dengan Jabatan Pengangkutan Jalan. Oleh itu, responden membuat permohonan ke Mahkamah Tinggi untuk mendapat perisytiharan di bawah s. 96(1) Akta Pengangkutan Jalan 1987 ('Akta') bahawa polisi insurans yang dikeluarkan oleh mereka adalah tidak sah dan/atau tidak boleh dikuatkuasakan atas alasan-alasan bahawa terdapat pertukaran dalam pemilikan kenderaan yang diinsuranskan tanpa notis diserahkan kepada responden. Perayu-perayu menghujahkan bahawa permohonan responden untuk membatalkan polisi di bawah s. 96(3) Akta adalah di luar tempoh had masa. Juga telah dihujahkan oleh perayu-perayu bahawa frasa 'the date the liability was incurred' dalam s. 96(3) harus ditafsirkan sebagai memerlukan permohonan di bawah subseksyen itu dibuat sebelum tarikh kemalangan. Menurut perayu-perayu, oleh kerana permohonan itu dibuat selepas kemalangan berlaku, ia tidak dapat dikekalkan dan mesti dibatalkan. Pesuruhjaya Kehakiman ('PK') telah menolak bantahan perayu-perayu dan membenarkan perisytiharan yang dituntut oleh responden. Tidak berpuas hati dengan keputusan tersebut, perayu merayu. Isu yang berbangkit adalah bilakah syarikat insurans boleh memulakan tindakan di bawah s. 96(3) Akta untuk mengisytiharkan polisi yang dikeluarkan kepada pihak yang diinsuranskan berkenaan kenderaan yang diinsuranskan tidak sah atau tidak boleh dikuatkuasakan.

Diputuskan (menolak rayuan dan tanpa perintah dengan kos)
Oleh Hamid Sultan HMR:

(1) Di bawah s. 96(1) Akta, jika penghakiman telah dibuat terhadap pemilik kenderaan, undang-undang memerlukan syarikat insurans untuk membayar kepada pihak ketiga yang memegang penghakiman, meskipun

syarikat insurans boleh mengelak atau membatalkan polisi. Pengecualian-pengecualian diberikan dalam sub-s. 96(2) dan (3) Akta.

(2) Perisytiharan boleh diperolehi sebelum penghakiman dalam guaman kecuaian. Mahkamah boleh, walau bagaimanapun, menolak perisytiharan itu jika pencelah-pencelah boleh membuktikan prejudis akibat kelewatan responden ke mahkamah untuk mendapatkan relif, mengambil kira bahawa peruntukan relevan mempunyai ciri-ciri undang-undang sosial.

(3) Afidavit perayu-perayu tidak menunjukkan apa-apa fakta berkaitan dengan persoalan prejudis atau bahawa ia tidak adil untuk membenarkan perisytiharan di peringkat ini, kecuali bahawa deponen itu mengadu tentang kelewatan dan bukan prejudis untuk mengekalkan tuntutan pihak ketiga akibat daripada kelewatan yang tidak dapat dibayar dengan pampasan kos oleh syarikat insurans berkenaan kelewatan.

Oleh Prasad Sandosham Abraham HMR:

(1) Responden berhak memperoleh perisytiharan daripada mahkamah bahawa polisinya adalah terbatal dan/atau tidak boleh dikuatkuasakan sebelum penghakiman dimasukkan terhadap responden iaitu apabila liabiliti akan ditanggung oleh responden. Perkataan-perkataan 'judgment in respect of any such liability as is required to be covered by a policy under para. 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy' di bawah s. 96(1) Akta menyokong proposisi itu.

(2) Liabiliti defendan (yang diinsuranskan) hanya timbul apabila penghakiman diperolehi terhadap defendan (yang diinsuranskan). Memperolehi penghakiman adalah satu prasyarat liabiliti dan dengan itu perkataan-perkataan harus ditafsirkan untuk bermaksud bahawa responden berhak untuk membuat permohonan untuk mengisytiharkan polisi sebagai terbatal dan tidak boleh dikuatkuasakan sebelum penghakiman dimasukkan terhadap defendan (yang diinsuranskan). Responden telah mematuhi s. 96(3) Akta.

Oleh Lim Yee Lan HMR:

(1) Seksyen 96(3) adalah bertujuan untuk menampung situasi di mana kemalangan telah mengakibatkan kematian atau kecederaan yang membawa kepada liabiliti dilitupi syarat-syarat polisi yang telah berlaku tetapi sebelum apa-apa penghakiman disebutkan oleh mahkamah dalam prosiding yang dimulakan oleh pihak ketiga untuk menuntut ganti rugi terhadap pemandu dan pemilik yang diinsuranskan berkenaan kecederaan dan/atau kematian itu.

A **(2)** Baris keputusan telah terkhilaf apabila, tanpa melihat s. 96 secara keseluruhan, mereka telah mentafsirkan perkataan-perkataan 'before the date the liability was incurred' dalam s. 96(3) untuk bermaksud tarikh sebelum kemalangan, tanpa menyedari bahawa keadaan di mana polisi telah dibatalkan sebelum kemalangan telah diliputi di bawah s. 96(2)(c)
B Akta.

(3) Di bawah s. 96(3) Akta, syarikat insurans boleh memulakan tindakan menolak polisi yang dikeluarkan bagi kenderaan yang diinsuranskan sebelum apa-apa penghakiman diperolehi dalam prosiding yang dimulakan oleh pihak ketiga untuk ganti rugi kecederaan atau kematian
C yang dialami dalam kemalangan jalan raya disebabkan oleh atau berbangkit daripada penggunaan kenderaan yang diinsuranskan.

Case(s) referred to:

Kurnia Insurans (Malaysia) Bhd v. Kein Hing Appliances Sdn Bhd (Shah Alam High Court OS 24-2979-12-2011)(Unreported) ***(refd)***

D *Pacific & Orient Insurance Co Bhd v. Goh Cheng Loong & Ors [2013] 1 LNS 1002 HC* ***(refd)***

Pacific & Orient Insurance Co Bhd v. Kamacheh Karuppen [2015] 4 CLJ 54 CA ***(refd)***

QBE Insurance Ltd v. Hashim Abdul & Anor [1980] 1 LNS 157 ***(refd)***

Legislation referred to:

E Road Traffic Ordinance 1958, s. 80(1)

Road Transport Act 1987, ss. 2, 90, 91(1)(a), (b), (4), 96(1), (2)(a), (b), (c) (3)

For the appellants - Ramani Krishnan; M/s Raj & Co

For the respondent - S Kanagasabapathi (R Davinia with him); M/s Kanaga, Suresh & Co

F *[Editor's note: For the High Court judgment, please see Allianz General Insurance Company (Malaysia) Berhad v. Imtinan Muhamad Sultan; Ahmad Nadzrin Abd Halim & Anor (Interveners) [2014] 1 LNS 992 (affirmed).]*

Reported by Suhainah Wahiduddin

G

JUDGMENT

Lim Yee Lan JCA:

Introduction

H **[1]** The appellants/interveners' appeal is against the decision of the Kuala Lumpur High Court made on 7 August 2014 in which the learned Judicial Commissioner (JC) had allowed a declaration sought by the respondent ("the insurer") *vide* an originating summons (OS). Pursuant to s. 96(3) of the RTA that the policy No. 12 MVL074908, effective from the period November 2012 to November 2013, issued in respect of a motor vehicle
I bearing registration No. WHH 4039 ("insured vehicle") registered in the name of one Imtinan Muhammad Sultan ("the insured") was void and

unenforceable in so far as the road accident which occurred on 22 January 2013 which involved motorcycle No. WUT 8370 and the insured vehicle and that the respondent was not liable for any order relating to the plaintiffs' suit.

Brief Facts

[2] The interveners were the plaintiffs in Suit No. A53KJ-379-12-2013 filed at the Bangi Sessions Court in which the plaintiffs, rider and pillion rider of motorcycle WUT 8370, claimed damages for injuries sustained in a road accident involving the said motorcycle and the insured vehicle. The suit was against one Danial as the driver of the insured vehicle and Imtinan Muhamad Sultan as the registered owner of the insured vehicle ("the defendants").

[3] Initially, the respondent had directed a solicitor to defend the defendants in the suit. During the course of the trial, the respondent discovered that the insured vehicle had been sold to another person by the name of Abdul Razak bin Yaacop ("new owner") and the driver ("Danial") was his son. The facts showed that although the sale of the insured vehicle took place before the date of the accident, the change in ownership was never registered with the Road Transport Department due to some spelling mistake in the name of the insured as it appears in his passport and in the record of the RTD and he remained the registered owner of the car. The new owner had been renewing the policy in the name of the insured, Imtinan Muhamad Sultan.

[4] The respondent then discharged the solicitor and filed the present OS to declare the policy void and unenforceable in so far as the road accident which occurred on 22 January 2013 and that the respondent was not liable for any order relating to the plaintiffs' suit.

[5] The respondent's application was premised on the ground that failure of the insured (second defendant in the Bangi suit) to disclose the sale of the car to the new owner (Danial's father) was a non disclosure of a material fact which entitled it to avoid the policy issued to the insured.

[6] The plaintiffs applied to intervene in the OS and were allowed by the court.

[7] The plaintiffs/interveners opposed the OS on the ground that the respondent's application to cancel the policy under s. 96(3) was out of time. It was argued that the phrase "the date the liability was incurred" in s. 96(3) must be interpreted as requiring an application under that subsection to be made before the date of accident. It cannot be applied after the accident.

[8] Since the application in this case was made after the accident, it could not be maintained and must be dismissed.

[9] After hearing the parties, the learned JC dismissed the plaintiffs/interveners' objection and granted the declaration sought by the respondent.

[10] In her judgment, the learned JC gave the following reasons for her decision:

> 15. The issue for determination here is the meaning to be given to the phrase "the date the liability was incurred" in section 96(3):
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> ...
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> 16. The above phrase has been the subject of judicial consideration in a number of cases. It appears that there are two lines of decisions on the construction to be given to this phrase. One adopting the position that the declaration must be obtained by the insurance company before the accident involving the insured vehicle, and the other taking the position that it must be obtained before judgment.
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> 17. In *Kurnia Insurans (Malaysia) Bhd v. Kein Hing Appliances Sdn Bhd* (Shah Alam High Court OS 24-2979-12-2011, the High Court adopted the latter view and granted an application under section 96(3), notwithstanding the fact that it was made after the accident. The Court rejected the contention that section 91(a)(b) demonstrated that the view that the application can be made at any time before judgment was erroneous. Hadhariah Bt Syed Ismail J explained:
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> > Di bawah seksyen 96(3) Akta Pengangkutan Jalan 1987, penanggung insurans boleh memohon deklarasi membatalkan polisi sebelum 'liability was incurred'. Peguam cara responded kedua berhujah bahawa perkataan 'before the date the liability was incurred' bermaksud pada masa kemalangan dan bukannya sebelum penghakiman diberikan. Saya dimaklumkan oleh peguam cara pemohon bahawa pemohon berada dalam keadaan 'catch 22' kerana jika deklarasi tidak dipohon sebelum penghakiman diberikan, mereka akan kehilangan hak untuk membatalkan polisi insuran itu kemudiannya. Saya berpendapat perkataan 'before the date the liability was incurred' itu bermaksud sebelum penghakiman diberikan. Pendapat saya itu berasaskan fakta bahawa tidak siapa yang tahu bila kemalangan akan berlaku. Adalah mustahil untuk menanggung insurans boleh mengesahkan polisi insurans sah pada hari kemalangan berlaku kerana siasatan perlu dibuat terlebih dahulu.
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> 18. The decision was affirmed by the Court of Appeal on 1 August 2013. It is imperative to note that the interveners repeat before me the same arguments that were unsuccessfully advanced in the Court of Appeal. The decision of the Court of Appeal constitutes a precedent by which this court is bound and concluded the issue here in favour of the plaintiffs. In the result, the application is not out of time and the plaintiffs are entitled to the declaration they seek as the Bangi action is still pending.

[11] Dissatisfied with the decision of the High Court the interveners/plaintiffs appealed to this court, hence this appeal before us.

[12] To our minds, the issue raised in this appeal boils down to this: A

> When in point of time can an insurance company commence an action under section 96(3) of the RTA to declare a policy issued to an insured in respect of an insured vehicle void or unenforceable?

[13] This question turns on the meaning to be given to the phrase "before the date the liability was incurred" found in s. 96(3). B

[14] As the issue involves an interpretation of a specific provision in a statute, in this case sub-s. 96(3) of the RTA (hereinafter "the Act") it is imperative for the court, when considering the meaning of certain words used in that section, to look at the whole of the section in order to discover the C legislative intent behind that section in general and the subsection in particular.

[15] Now s. 96 falls under Part IV of the Act in which the heading reads "Provisions Against Third Party Risks Arising Out Of The Use Of Motor Vehicle". A reading of the preamble to the Act shows that Part IV was D enacted to fulfil the object of the Act which is, *inter alia*, "to make provision for the protection of third parties against risks arising out of the use of motor vehicles".

[16] A perusal of the various sections (88 to 107) in Part IV would indicate that they proscribe a compulsory third party insurance scheme which is E designed to protect third party road users who may suffer bodily injury or death caused by or as a result of the use of an insured vehicle on the road. To achieve that objective, *inter alia*, these provisions require the registered owner of a vehicle to take out a policy in respect of the vehicle against third party risks (s. 90) only with an authorised insurer defined in the Act (s. 91) F and imposes an obligation on the insurer to honour a policy against third party risks issued in respect of the insured driver and insured vehicle, notwithstanding any right it may have against the insured to repudiate any liability covered under the policy (s. 96(1)).

[17] In the light of the compulsory third party insurance scheme as G proscribed in Part IV of the RTA, it can be concluded that while the obligation of an insurer to indemnify an insured against any third party claim in any negligence suit involving the insured vehicle is a contractual obligation based on the terms of the policy issued, an insurer's obligation to satisfy a judgment sum obtained by a third party for bodily injuries or death H caused by or arising from the use of an insured vehicle is founded on statute.

[18] That this is the position of the law is succinctly explained by this court in its latest decision in the case of *Pacific & Orient Insurance Co Bhd v. Kamacheh Karuppen* [2015] 4 CLJ 54.

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[19] In that case, the central issue for determination in the appeal was whether the insurer (appellant in that case) ought to be held liable to pay to the third party (respondent) whose injuries had been caused by the criminal

use of the vehicle by the insured. Simply put, whether the use of the insured vehicle would cover the use of the same in a criminal act.

[20] In answering the question in the affirmative, this court sets out the law governing the nature of the obligation of an insurer to a third party under s. 96(1) of the Act in the following manner:

> (1) The right of the respondent as a third party to approach the court for redress against the appellant, who itself was not a tortfeasor and with whom the respondent had no contractual relationship, arose from statutory empowerment under s. 96 of the RTA. The mechanism of s. 96 of the RTA operates thus: there is a statutory obligation created by s. 96 of the RTA on the part of the insurer on being so notified on the failure of the insured to pay up the judgment sum that the insured had failed to be satisfied in favour of the third party. This duty to pay up is statutory in origin and is an exception to the concept founded upon privity of contract. (para 17)
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> (4) Section 96(1) imposes upon the insurer the obligation of paying to the person who had obtained judgment against the insured, after a certificate of insurance had been duly delivered to the person by whom the policy is effected in respect of any third part risk covered under the policy. The appellant in the present appeal was obliged statutorily to pay the respondent who had obtained the judgment against the insured and therefore, it was the insurer's mandatory duty to satisfy the judgment. (para 38);
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> (5) The appellant would be able to avoid the payment obligation under the circumstances and conditions mentioned in sub-ss. (2) and (3) of s. 96 of the RTA ie, where the requisite notice of the proceedings was not given to the insurer before the commencement of the proceedings; where there is a stay of the judgment pending appeal; where the policy of insurance respecting the liability had been cancelled; and where the insurer had obtained a declaration from the court that the insurance was void and unenforceable. However, none of the conditions were fulfilled by the appellant to exonerate its statutory obligation under the policy. (paras 39 & 40);
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> (6) Sections 94 and 95 of the RTA prohibited an insurer from relying on certain terms in an insurance policy for the purposes of excluding liability. Section 95(k) of the RTA specifically stated that an insurer cannot rely on any conditions which purports to restrict the insurance of the persons insured by reference to the matters set out therein, *inter alia*, that the motor vehicle was being used for a purpose other than the purpose stated in the policy. Hence, the insurer could not impose such terms and conditions on their insurance policy that would be contrary to RTA as was done in the General Exception 3(a) of the policy

[21] Based on the decision of this court in *Pacific & Orient Insurance Co Bhd v. Kamacheh Karuppen*, it is now clear that the following are the only circumstances and conditions under which an insurer would be able to avoid its payment obligation to the third party in respect of any judgment obtained against an insured owner under s. 96(1), namely:

(i) before or within seven days after the commencement of the proceedings in which the judgment was given, the insurer was not given any notice of the proceedings (s. 96(2)(a); A

(ii) where the execution of the judgment is stayed pending an appeal (s. 96(2)(b);

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(iii) before the happening of the event which was the cause of the death or bodily injury giving rise to the liability covered under the policy, the policy has been cancelled by mutual consent between the insured and the insurer or by virtue of any provision contained therein and the certificate of insurance surrendered to the insurer pursuant to such cancellation (s. 96(2)(c)); C

(iv) before the date the liability was incurred, the insurer had obtained a declaration from a court that the insurance was void or unenforceable (s. 96(3)).

[22] One would notice at once from the above narration that the circumstance mentioned in s. 96(2)(c) is different from the circumstance specified in s. 96(3), *viz*, while s. 96(2)(c) uses the words "if before the happening of the event which was the cause of the death or bodily injury giving rise to the liability", s. 96(3) uses the words "before the date the liability was incurred". D E

[23] In our view, the choice of words was intentional and was meant to cover two different circumstances under which an insurer can repudiate its liability under a policy.

[24] Section 96(2), in our view, is meant to cover a situation where before the happening of the accident which was the cause of the death or bodily injury giving rise to the liability, the policy has been cancelled by mutual consent between the insured and the insurer accompanied by the surrender of the certificate of insurance, because the words "the event which was the cause of the death" in simple layman terms can only mean "the accident which was the cause of the death". F G

[25] Section 96(3), on the other hand, is intended to cover a situation in which the accident which was the cause of the death or bodily injury giving rise to the liability covered by the terms of policy has already occurred but before any judgment is pronounced by the court in the proceeding commenced by the third party to claim damages against the driver and insured owner in respect of such bodily injuries and or death. H

[26] Hence, the first line of decisions went into error when, without looking at s. 96 as a whole, they had interpreted the words "before the date the liability was incurred" in s. 96(3) to mean a date before the accident, without realising that the circumstance under which a policy can be cancelled before the accident is already covered under s. 96(2)(c). I

[27] In this regard, we agree with and cite with approval the following passage of the judgment in the case of *Pacific & Orient Insurance Co Bhd v. Goh Cheng Loong & Ors* [2013] 1 LNS 1002, in which Vazeer Alam Mydin Meera JC (as he then was) sets out correctly the proper interpretation to be given to s. 96(3) in the following manner:

> [16] A careful reading of section 96(3) of the Road Transport Act 1987 shows that the insurer can repudiate liability only if, before liability was incurred, the insurer has obtained a declaration from the court to the effect that the policy of insurance is void or unenforceable. Here, the statutory liability for the Plaintiff to pay would arise from the operation of section 96(1) of the Road Transport Act 1987 which reads:
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> > If, after a certificate of insurance has been delivered under subsection 91(4) to the person by whom a policy has been affected, judgment in respect of any such liability as is required to be covered by a policy under paragraph 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments.
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> [17] Therefore, it is abundantly clear that the insurer's statutory liability to pay would come about when judgment in respect of any such liability as is required to be covered by a policy under paragraph 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy and the requisite notice under section 96(2) of the Road Transport Act 1987 has been given by the claimant, provided that the other provisos in section 96(2) did not apply. Once that liability has arisen the insurer cannot avail itself of the provisions of section 96(3) of the Road Transport Act 1987 to seek declaratory relief to repudiate liability. In this case, that judgment on liability pursuant to section 96(3) would be the judgment of the Sessions Court in the Sessions Suit, which has been delivered.

[28] Based on the foregoing discussion and findings, we are of the view that the learned JC was right when she, in reliance on the case of *Kurnia Insurans (Malaysia) Bhd v. Kein Hing Appliances Sdn Bhd* (which had since been affirmed by this court although no written judgment has been issued), dismissed the objection of the plaintiffs/interveners that the respondent's application for a declaration under s. 96(3) was out of time on the ground that while a suit had been commenced by the plaintiffs/interveners against the defendants in the Bangi Sessions Court, the case has not been completed and no judgment has been pronounced as yet by the Bangi Sessions Court.

[29] Be that as it may, we noticed that the one pertinent question which so far escapes the attention of the courts dealing with s. 96 of the Act is, what would happen to a third party where a policy has been cancelled or repudiated pursuant to the circumstances provided in s. 96(2) and s. 96(3) of the Act? Would he be left with a paper or empty judgment in the event the driver or registered owner of the vehicle cannot satisfy the judgment sum?

[30] In view of the legislative intent behind Part IV of the Act, which is to provide a compulsory insurance scheme for the protection of a third party against risk arising out of the use of a motor vehicle on the road, the Act ensures that there are adequate provisions to cover these eventualities.

[31] These provisions are found in s. 91(1)(a) of the Act. As stated earlier, s. 91 provides that a policy is only effective if it is obtained from an authorised insurer. An "authorised insurer" is in turn defined in s. 2 of the Act as "a person lawfully carrying on motor vehicle insurance business in Malaysia who is a member of the Motor Insurers' Bureau".

[32] The term "Motor Insurers' Bureau" is in turn defined in s. 2 of the Act as "the Motor Insurers' Bureau which has executed an agreement with the Minister of Transport to secure compensation to third party victims of road accidents in cases where such victims are denied compensation by the absence of insurance or of effective insurance".

[33] Reading s. 91 together with the definition of "authorised insurer", it would necessarily mean that every insurance company carrying on a motor insurance business in Malaysia is a member of the Motor Insurers' Bureau.

[34] In this regard, the latest memorandum of agreement signed between the Motor Insurers' Bureau and the Minister of Transport is the memorandum of agreement dated 1 January 1992 (MOT-MOA). Pursuant to the MOT-MOA, the Motor Insurers' Bureau (Bureau) had in turn entered into a memorandum of agreement (Insurers-MOA) of even date between the Bureau and all the insurers of motor vehicle insurance which binds each of the insurers to the Bureau and severally to each and every other of the insurers to perform the MOT-MOA.

[35] Under the insurers-MOA, every insurance company in Malaysia has agreed in principal to provide insurance coverage in the following situations:

(a) In the event the insurance is obtained fraudulently, or through misrepresentation, non-disclosure of material fact or mistake (cl. 1(ii));

(b) in the event the vehicle is under the control of an "unauthorised driver" (cl. 1(iv)); and

(c) in the event the ownership and or interest in a vehicle had changed hands (cl. I (vi)).

[36] Clause 2 of the MOT-MOA provides that the Bureau will consider to make at its absolute discretion, compassionate payments or allowances to persons injured and to the dependents of persons killed in the accident through the use of motor vehicles which do not have in force any policy of insurance as required by Part IV of the RTA or where such a policy is ineffective for any reason other than the inability of the insurer to make payment.

[37] Clause 4 of the MOT-MOA allows the Bureau or the insurer (who has paid on behalf of the Bureau) to recover any sum paid under cl. 2 of the MOT-MOA against the policy holder or any other person.

[38] Based on the foregoing provisions in s. 91, it is clear that a third party who obtains judgment against an uninsured driver and or registered owner of a vehicle by virtue of its cancellation or repudiation by the insurer can look to the Bureau for satisfaction of the judgment sum, although as we understood it, not to the full extent but in practice up to 75% of the judgment sum.

Conclusion And Decision

[39] Based on the foregoing discussions and findings, our answer to the question raised in this appeal is that under s. 96(3) of the Act, an insurer can commence an action to repudiate a policy issued in respect of an insured vehicle before any judgment is obtained in the proceeding commenced by a third party for damages for bodily injuries or death sustained in a road accident caused by or arising from the use of the insured vehicle.

[40] For the foregoing reasons, we dismiss the appeal with no order as to costs and affirm the decision of the High Court.

Hamid Sultan Abu Backer JCA:

[41] The appellants/interveners appeal against the decision of the learned High Court Judge in relation to a declaration by the respondent insurer of the motorcycle No: WUT 8370 against the insured, Imtinan Muhammad Sultan, the respondent in the originating summon. Despite the interveners' objection to the declaration, the learned High Court Judge had allowed the respondents' prayer for a declaration which reads as follows:

> 1. Masa (jika perlu) dilanjutkan untuk memfailkan Saman Pemula ini;
>
> 2. Polisi No. 12MVL074908 yang melindungi motorkar No. WHH 4039 bagi tempoh dari 6.11.2012 hingga 5.11.2013 adalah tak sah (void) dan tidak boleh dikuatkuasakan (unenforceable) setakat perlindungan terhadap satu kemalangan jalanraya yang berlaku pada 22/1/2013 yang melibatkan motorsikal No. WUT 8370 dan motorkar No. WHH 4039;
>
> 3. Selanjutnya, Pemohon tidak bertanggungjawab untuk menanggung sebarang perintah berikutan dengan tindakan Sivil di Mahkamah Sesyen Bandar Baru Bangi Dalam Selangor Darul Ehsan, Malaysia Saman No. A53KJ-379-12/2013;

[42] The interveners are the plaintiffs in a suit No. 24NCVC-774-05-2014, claiming damages for negligence against vehicle owner Imtinan Mohammad Sultan. The insurer had directed the solicitor to defend the suit and the action has been tried but no judgment has been delivered. During the course of trial, the insurer had discovered that the vehicle had been sold to another person at the time of the accident. To avoid liability, the insurer who is the respondent in this appeal had filed for declaration and was successful.

[43] Upon hearing the submission, we reserved judgment. My learned sister Lim Yee Lan JCA and learned brother Prasad Sandosham Abraham JCA have written separate judgments. This is my judgment.

Preliminaries

[44] The learned trial judge had set out the facts as well as the law in a lucid manner. In concluding the judgment, the learned High Court Judge had relied on the judgment of the High Court in the case of *Kurnia Insurans (Malaysia) Bhd v. Kein Hing Appliances Sdn Bhd* (Shah Alam High Court OS 24-2979-12-2011), which is said to have been affirmed by the Court of Appeal but no written grounds are available. Both learned counsel agree there are conflicting decisions of the High Court in relation to the construction of s. 96(3) of the Road Transport Act 1987 (RTA 1987) and there is no written decision of the Court of Appeal on this issue.

[45] In the instant case, it is not in dispute that insurers can seek a declaration to avoid a policy and/or certificate of insurance issued for a motor vehicle under RTA 1987. The issue is when that application should be made, taking into consideration the insurance policy is mandatory to cover third party liability and in that respect, some of the provisions in RTA 1987 can be categorised as a social legislation to protect road users from the negligence caused by the usage of motor vehicle owned by the assured. The learned High Court Judge had captured this part of the argument in the judgment and it reads as follows:

> 12. The interveners, on the other hand, did not dispute that the plaintiffs were entitled in law to avoid the policy on account of the defendant's omission to disclose the sale, but contended that the application for the cancellation of the policy under s. 96(3) was out of time. It was argued that the phrase "the date the liability was incurred" in section 96(3) must be interpreted as requiring any application under this provision must be made before the date of accident. It cannot be applied for after the accident. It was argued that this construction was supported by the wording used in section 91(1)(b) which states:
>
> > In order to comply with the requirements of this Part, a policy of insurance must be a policy which:
> >
> > (a) Is issued by a person who is an authorised insurer within the meaning of this Part; and

A (b) Insures such person, or class of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle or land implement drawn on a road.

B 13. The interveners argued that as the plaintiffs have made the application after the accident, it cannot be maintained and must be dismissed.

14. Section 96(1) of the 1987 Act imposes a duty on insurance companies to satisfy judgments against persons insured in respect of third parties. It is common ground that under section 96(1), the plaintiffs will be bound C to satisfy any judgment obtained against the defendant in the Bangi action unless the plaintiff obtains a declaration as set out in section 96(3).

15. The issue for determination here is the meaning to be given to the phrase "the date the liability was incurred" in section 96(3). For ease of reference, I set out section 96(3):

D No sum shall be payable by an insurer under subsection (1) if before the date the liability was incurred, the insurer had obtained a declaration from a court that the insurance was void or unenforceable:

Provided that an insurer who has obtained such a declaration E as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action unless, before or within seven days after the commencement of that action, he has given notice thereof to the person who is the plaintiff in the said proceedings F specifying the grounds on which he proposes to rely, and any person to whom notice of such an action is so given shall be entitled if he thinks fit to be made a party thereto.

(emphasis added)

16. The above phrase has been the subject of judicial consideration in a G number of cases. It appears that there are two lines of decisions on the construction to be given to this phrase. One adopting the position that the declaration must be obtained by the insurance company before the accident involving the insured vehicle, and the other taking the position that it must be obtained before judgment.

H 17. In *Kurnia Insurans (Malaysia) Bhd v. Kein Hing Appliances Sdn Bhd* (Shah Alam High Court OS 24-2979-12/2011), the High Court adopted the latter view and granted an application under section 96(3), notwithstanding the fact that it was made after the accident. The court rejected the contention that section 91(1)(b) demonstrated that the view that the application can be made at any time before judgment was erroneous. Hadhariah Bt. Syed I Ismail J explained:

Di bawah seksyen 96(3) Akta Pengangkutan Jalan 1987, penanggung insurans boleh memohon deklarasi membatalkan polisi sebelum 'liability was incurred'. Peguamcara responden kedua berhujah bahawa perkataan 'before the date the liability was incurred' bermaksud pada masa kemalangan dan bukannya sebelum penghakiman diberikan. Saya dimaklumkan oleh peguamcara pemohon bahawa pemohon berada dalam keadaan 'catch 22' kerana jika deklarasi tidak dipohon sebelum penghakiman diberikan, mereka akan kehilangan hak untuk membatalkan polisi insuran itu kemudiannya. Saya berpendapat perkataan 'before the date the liability was incurred' itu bermaksud sebelum penghakiman diberikan. Pendapat saya itu berasaskan fakta bahawa tidak siapa yang tahu bila kemalangan akan berlaku. Adalah mustahil untuk penanggung insurans boleh mengesahkan polisi insurans sah pada hari kemalangan berlaku kerana siasatan perlu dibuat terlebih dahulu.

18. The decision was affirmed by the Court of Appeal on 1 August 2013. It is imperative to note that the interveners repeat before me the same arguments that were unsuccessfully advanced in the Court of Appeal. The decision of the Court of Appeal constitutes a precedent by which this court is bound and concludes the issue here in favour of the plaintiffs. In the result, the application is not out of time and the plaintiffs are entitled to the declaration they seek as the Bangi action is still pending.

Brief Facts

[46] The respondent had issued a motor policy to the vehicle owner, Imtinan Muhamad Sultan who is said to have sold the vehicle to Abdul Razak bin Yakop. However, the vehicle was not registered in the Road Transport Department due to some technicalities.

[47] Abdul Razak's son, Danial, while driving the vehicle collided with a motorcycle and injured two persons who are the interveners as well as the appellants in this appeal.

[48] The interveners had initiated a suit in negligence against Danial as the driver and Imtinan as the motor vehicle owner. The respondent had appointed lawyers to defend Imtinan and also had filed defence. Subsequently, realising that Imtinan had sold the motor vehicle, the insurer had filed the originating summons to avoid liability under the insurance policy.

Construction And Jurisprudence In Relation To s. 96(3) of The RTA 1987

[49] It is a mandatory requirement for a motor vehicle owner to obtain an insurance policy to cover third party risks. (See s. 90 of the RTA 1987). The insurance coverage technically is not for the motor vehicle owner *per se*, but to cover negligence caused by the use of the motor vehicle by any person. (See s. 91(1)(b) of the RTA 1987). That is to say, any person can drive the

motor vehicle whether authorised by the owner or otherwise, but if the vehicle causes damage to third party, the insurers are liable to pay under the policy unless the insurance policy and/or the certificate stated in s. 91(4) of the RTA 1987 is set aside by the order of court. (See s. 91 of the RTA 1987).

[50] Under s. 96(1), if judgment has been made against the motor vehicle owner, the law requires the insurer to pay to the third party who holds the judgment, notwithstanding the insurer could have avoided or cancelled the policy. The exceptions are spelt out in sub-s. 96(2) and (3) of the RTA 1987. The said section reads as follows:

> (1) If, after a certificate of insurance has been delivered under subsection 91(4) to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments.
>
> 2. No sum shall be payable by an insurer under subsection (1):
>
> (a) in respect of any judgment, unless before or within seven days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the proceedings;
>
> (b) in respect of any judgment, so long as execution thereon is stayed pending an appeal; or
>
> (c) in connection with any liability, if before the happening of the event which was the cause of the death or bodily injury giving rise to the liability the policy was cancelled by mutual consent or by virtue of any provision contained therein and either:
>
> (i) before the happening of the said event the certificate was surrendered to the insurer or the person to whom the certificate was delivered made a statutory declaration stating that the certificate had been lost or destroyed;
>
> (ii) after the happening of the said event, but before the expiration of a period of fourteen days from the taking effect of the cancellation of the policy, the certificate was surrendered to the insurer or the person to whom the certificate was delivered made such a statutory declaration as aforesaid; or
>
> (iii) either before or after the happening of the said event, but within the said period of fourteen days, the insurer has commenced proceedings under this Part in respect of the failure to surrender the certificate.

(3) No sum shall be payable by an insurer under subsection (1) if before the date the liability was incurred, the insurer had obtained a declaration from a court that the insurance was void or unenforceable:

Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action unless, before or within seven days after the commencement of that action, he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the grounds on which he proposes to rely, and any person to whom notice of such an action is so given shall be entitled if he thinks fit to be made a party thereto.

[51] It is trite that the declaratory relief are discretionary relief. If the court finds it will be unjust on the facts and circumstances to grant the declaration it may refuse the declaration. There must be material before the court to refuse the declaration.

[52] I have read the appeal records and the able submission of learned counsel. After much consideration to the submission of the respondent, I take the view that the appeal must be dismissed. My reasons *inter alia* are as follows:

(i) I agree with the respondent (insurer)'s submission that a declaration can be obtained before the judgment in the negligence suit. However, the court can refuse the declaration if the interveners can demonstrate prejudice in consequence of the delay by the respondent approaching the court for the relief, taking into consideration that the relevant provision has the characteristic of social legislation.

(ii) We have perused the affidavit of the interveners. The affidavit does not demonstrate any fact relevant to the question of prejudice or that it will be unjust to grant a declaration at this stage, save that the deponent only complains of delay and not prejudice to sustain third party claim in consequence of delay which cannot be compensated by costs by the insurer in respect of the delay.

[53] For reasons stated above, the appeal is dismissed with no order as to costs.

[54] We hereby order so.

Prasad Sandosham Abraham JCA:

[55] This appeal was heard on 22 January 2015 and we adjourned the matter for decision to a date to be fixed as we were of the view that the appeal raised an important question of law that required our further deliberation. I now deliver my judgment. The facts material to this appeal are now set out below.

A **Facts Germaine To This Appeal**

[56] The facts in the present case are not in dispute. The defendant, Imtinan Muhamad Sultan, was the registered owner of the motorcar and had applied for insurance cover for the motorcar from the respondent for the period 6 November 2012 to 5 November 2013.

B

[57] The motorcar was involved in an accident on 22 January 2013 with motorcycle bearing registration No. WUT 8370 which was being ridden by Ahmad Nadzrin b Abd Halim ("the rider") with Muhammad Aiman b Abd Rahman as his pillion (interveners). The registered owner of the motorcycle was Abd Rahman b Sudin. At the time of accident, the motorcar was not driven by the defendant, but one Danial Iskandar bin Abdul Razak ("Danial").

C

[58] Messrs Raj & Co then instituted a civil suit at the Bandar Baru Bangi Sessions Court ("the Bangi action") on behalf of the rider and his pillion against Danial and the defendant to claim for damages for injuries and losses suffered as a result of the accident. The summons and statement of claim averred that Danial was the driver of the motorcar and the defendant was the owner.

D

[59] Following the receipt of the summons and the statement of claim, the respondent appointed adjusters to investigate the claim and engaged solicitors to represent the defendant in the Bangi action. The adjusters obtained copies of the police reports made by Danial, the rider, his pillion and Danial's father, Abdul Razak bin Yaacob in respect of the accident.

E

[60] The respondent then discovered that the defendant had sold the motorcar to Danial's father prior to the accident. This information had come from Danial's father who had in his possession the relevant supporting documents to corroborate his statement that he had become the new owner at the material time. According to Danial's father, he had taken the forms executed by the defendant to effect the name change but was unable to do so because the Road Transport Department had made a mistake in the spelling of the defendant's name in their records. It did not tally with the defendant's name as spelt in his Indonesian passport. Danial's father also informed the plaintiffs that the defendant could not be reached thereafter to rectify the mistake in the records of the Road Transport Department and has remained the registered owner.

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G

H

[61] Danial's father gave a statutory declaration confirming his purchase of the motorcar from the defendant prior to the accident.

[62] On 8 May 2014, the respondent filed the present application to cancel the policy. The application was supported by two affidavits affirmed by Wong Chee Yein and Ratnadevi d/o Irusan. It was averred that the defendant had failed to disclose the sale of the motorcar and this omission entitled the plaintiff to avoid the policy. It was explained that the respondent had

I

mistakenly engaged solicitors to represent the defendant in the Bangi action not knowing that the defendant had no insurable interest in the motorcar at the time of accident, but discharged themselves upon confirming that the latter had sold the motorcar.

[63] The rider and his pillion ("the interveners") applied to intervene in these proceedings and on 2 July 2014 were given leave to do so.

Findings

[64] To decide this question, reference should be made to s. 96(3) of the Road Transport Act 1987 ("the said Act") and in particular s. 96(1) of the said Act which sets out the purport of the scheme for persons insured in respect of third party risks. And I set out s. 96(1) *in toto*:

> **Duty of Insurers to justify judgments against persons insured in respect of third party risk**
>
> *(1) If, after a certificate of insurance has been delivered under subsection 91(4) to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgment* any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments.
>
> (emphasis added)

[65] In our particular case the respondent had made an application to the High Court to seek a declaration under s. 96(1) of the said Act that the insurance policy issued by them was void and/or unenforceable. The grounds for that application was that there had been a change in the ownership of the insured vehicle without due notice being given to the applicant (a fact not in dispute).

[66] The appellants in this case do not seriously challenge the right of the respondent to do so. But the argument that they mount before this court is that the respondent is precluded from doing so as the respondent had failed to seek such a declaration before the date of the accident.

[67] This would require an interpretation of s. 96(3) of the said Act and in particular the words "if before the date the liability was incurred". For purposes of gravity, the whole of s. 96(3) is set out below:

> **Duty of Insurers to justify judgments against persons insured in respect of third party risk**
>
> (3) **No sum shall be payable by an insurer under subsection (1) if before the date the liability was incurred**, the insurer had obtained a declaration from a court that the insurance was void or unenforceable:

A Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action unless, before or within seven days after the commencement of that action, he has given notice thereof to the person who is the
B plaintiff in the said proceedings specifying the grounds on which he proposes to rely, and any person to whom notice of such an action is so given shall be entitled if he thinks fit to be made a party thereto. (emphasis added)

[68] I have examined the authorities on this subsection which appeared to
C be divergent ie, a group of cases holding that such a declaration must be made before the date of the accident, and the other view ie, such an application to be made before judgment is entered, a view taken by a learned judge in this present appeal.

[69] Having perused all the cases, it is my considered view that the words
D that I referred to earlier must mean that the respondent is entitled to obtain a declaration from court that its policy was void and/or unenforceable before judgment was entered against the respondent which in our view is when liability will be incurred by the respondent. If s. 96(1) of the said Act is looked at, particularly the words "judgment in respect of any such liability
E as is required to be covered by a policy under para. 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy" supports that proposition. In our present case the learned judge followed *Kurnia Insurans (Malaysia) Bhd v. Kein Hing Appliances Sdn Bhd* (Shah Alam High Court OS 24-2979-12-2011) and the judgment of the
F Ladyship Hadhariah J whose reasoning I agree. This particular case went on appeal to this court and the judgment was upheld. Hadhariah J explained:

Di bawah seksyen 96(3) Akta Pengangkutan Jalan 1987, penanggung insurans boleh memohon deklarasi membatalkan polisi sebelum 'liability was incurred'. Peguamcara responden kedua berhujah bahawa perkataan
G 'before the date the liability was incurred' bermaksud pada masa kemalangan dan bukannya sebelum Penghakiman diberikan. Saya dimaklumkan oleh peguamcara pemohon bahawa pemohon berada dalam keadaan 'catch 22' kerana jika deklarasi tidak dipohon sebelum Penghakiman diberikan, mereka akan kehilangan hak untuk membatalkan Polisi Insuran itu kemudiannya. Saya berpendapat perkataan 'before the
H date the liability was incurred' itu bermaksud sebelum Penghakiman diberikan. Pendapat saya itu berasaskan fakta bahawa tidak siapa yang tahu bila kemalangan akan berlaku. Adalah mustahil untuk penanggung insurans boleh mengesahkan polisi insurans sah pada hari kemalangan berlaku kerana siasatan perlu dibuat terlebih dahulu.

I **[70]** I am also in agreement by the views express by His Lordship Justice Vazeer in the case of *Pacific & Orient Insurance Co Berhad v. Goh Cheng Loong & Ors* [2013] 1 LNS 1002 an unreported decision and to the judgment at p. 11 and 12 and I quote:

[16] A careful reading of section 96(3) of the Road Transport Act 1987 shows that the insurer can repudiate liability only if, before liability was incurred, the insurer has obtained a declaration from the court to the effect that the policy of insurance is void or unenforceable. Here, the statutory liability for the Plaintiff to pay would arise from the operation of section 96(1) of the Road Transport Act 1987 which reads:

> If, after a certificate of insurance has been delivered under subsection 91(4) to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments.

[17] Therefore, it is abundantly clear that the insurer's statutory liability to pay would come about when judgment in respect of any such liability as is required to be covered by a policy under paragraph 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy and the requisite notice under section 96(2) of the Road Transport Act 1987 has been given by the claimant, provided that the other provisos in section 96(2) did not apply. Once that liability has arisen the insurer cannot avail itself of the provisions of section 96(3) of the Road Transport Act 1987 to seek declaratory relief to repudiate liability. In this case, that judgment on liability pursuant to section 96(3) would be the judgment of the Sessions Court in the Sessions Suit, which has been delivered. Therefore, the liability in respect of the policy issued to the 1st Defendant has arisen and incurred by the Plaintiff and any declaration issued by this court subsequent thereto pursuant to section 96(3) of the Road Transport Act 1987 would be redundant and would be of no use to the Plaintiff to avoid liability. In this regard, I agree with submissions of counsel for the 3rd Defendant that, this application is an abuse of the court's process.

Again the reasoning with which I agree with.

[71] Another instructive case in my view which sheds light on this question of interpretation of this words is the case of *QBE Insurance Ltd v. Hashim Abdul & Anor* [1980] 1 LNS 157; [1981] 2 MLJ 275 and to the judgment of Syed Agil Barakbah J (as he then was). Before I proceed to deal with this case I wish to place a rider that the case deals with the precursor to the current said Act ie, Road Traffic Ordinance 1958. But we are of the view that the principle of interpretation remains the same. It was held by Justice Syed Agil

Barakbah (as he then was) that liability is incurred only when judgment in respect of liability as covered by the terms of the said insurance policy is given against the insured and we quote from the judgment at p. 276:

> The law as to the insurers' statutory obligation towards third parties is set out in paragraph 769 on page 375 of 22 *Halsbury's Laws of England* (3rd Edition) as follows:
>
> > *The first condition of the obligation of the insurers is that there is a judgment. The second condition is that the judgment must be in respect of a liability which is required to be covered by compulsory insurance. In other words the only person who can maintain a right of action direct against the insurers is a person falling within a limited class of third parties whose bodily injury or death is required to be covered by a motor policy. The third condition is that the liability is in fact covered by the terms of the policy or would be covered by the policy but for the fact that the insurer is entitled to avoid or cancel, or has avoided or cancelled the policy*.
>
> The above deals with section 10(1) of the English Road Traffic Act, 1934 which is in *pari materia* to our subsection (1) to section 80.
>
> It is clear from his grounds that in construing subsection (1) of section 80 the magistrate failed to direct his mind that the statutory liability of the Insurance Company to pay any claim made against the insured i.e. the second defendant commences when judgment in respect of such liability as is covered by the terms of the policy is given against the insured. *Such judgment being a condition precedent, no liability can be attached to or imposed upon the insurers until and unless judgment has been obtained*.
>
> Secondly the reason for the application of a Third Party Notice is because the Insurance Company intended to avoid liability for any damages arising out of the accident as stated earlier. The learned Magistrate feared that if the insurers were not brought in as Third Party, they would be absolved from liability to indemnify the injured party and in the circumstances he was of the opinion that the whole effect of section 80(1) would be defeated.
>
> The effect of the section is sufficiently considered by H.T. Ong C.J. (as he then was) in *New Zealand Insurance Co. Ltd. v. Sinnadorai* with which I agree with respect. On page 184 his Lordship says:
>
> > The marginal note describes it as the 'duty of insurers to satisfy judgments against persons insured in respect of third party risks'. This duty is, of course a liability to indemnify the policy holder (including whomsoever may be insured by the policy) against judgments obtained by a third party. The third party is in fact in a better position than the insured himself because it is declared that 'notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the claim of the third party nevertheless prevails.
>
> The insured's right to be indemnified is naturally a valuable chose in action .... (emphasis added)

[72] The liability of the defendant (insured) only arises when judgment is obtained against the defendant (insured). The case cited s. 80(1) of the Road Traffic Ordinance which is similar in terms to the said Act. How can it be said that liability arises immediately upon issuance of a policy when the purpose of the same was to cover a third party claim against the defendant (insured) when and only when judgment is entered against the defendant (insured). So it follows as alluded to in the cases cited, that obtaining of the judgment is a condition precedent to liability and therefore the words should be interpreted to read that the respondent was entitled to make the application to declare the insurance policy void and unenforceable before judgment was entered against the defendant (insured).

[73] I also find that the respondent had complied with s. 96(3) of the said Act and the proviso to the same. In light of that, the appeal of the appellants in this appeal is dismissed with no order to costs.